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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FELIX MAQUIZ, Defendant and Appellant.	H034495 (Monterey County Super. Ct. No. SS072429A)

The Monterey County District Attorney charged appellant with one count of possession of a weapon by a prisoner. (Pen. Code, § 4502, subd. (a).) The information contained an allegation that appellant had one prior strike conviction within the meaning of Penal Code section 1170.12.

The charges against appellant arose after appellant was searched by officers of the California Department of Corrections and Rehabilitation. Specifically, acting on information that there was a possible threat to staff at the Salinas Valley State Prison, Officer Wade Rasley removed appellant and his cellmate from cell 122, and searched them. After taking appellant and his cellmate to the lower shower in C Pod, Officer Rasley had appellant pass his clothing through a port. After searching the clothing, Officer Rasley found what appeared to be a pencil in the front pocket of appellant's sweats. However, on closer examination Officer Rasley found a steel rod inside the core

of the pencil. In fact, Officer Rasley had to break off the tip of the pencil and remove some yellow paper and tape from the shaft before the steel rod was discovered. At trial, Officer Rasley testified that the steel rod could be used as a weapon or stabbing instrument.

On November 21, 2007, the Wednesday before trial was to begin on the following Monday,[1] defense counsel declared a doubt as to appellant's competence to stand trial pursuant to Penal Code section 1368, which provides in pertinent part "(b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing . . . ." The trial court suspended criminal proceedings, ordered a mental health evaluation and refused to entertain appellant's motion made

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[1] Without citation to the record, appellant asserts that he did not waive time in this case so his counsel's declaration of doubt as to his competence to stand trial came at the last possible moment in the speedy trial window. On this court's own motion we requested that the record be augmented with the court minutes of all hearings held between the time appellant was arraigned on the complaint and the time that proceedings were suspended on November 21, 2007; minutes that were not already in the record. These court minutes do indeed show that appellant did not explicitly waive time in this case. He was arraigned on the complaint on August 23, 2007; he did not waive time. His next court appearance was September 5, 2007, for calendar call. The preliminary hearing was held on September 7, 2007, and appellant was held to answer. The information in this case was filed on September 13, 2007. Appellant was arraigned on the information on October 3, 2007. Again, no time waiver was entered. Under Penal Code section 1049.5, the court was required to set a trial date within 60 days, unless good cause was shown at a hearing and the reasons for the delay set forth in the record. Accordingly, under this statute the last date for a trial to begin was November 26, 2007, the exact date that it was scheduled to commence. Appellant's next court appearance was November 21, 2007. As far as appellant's speedy trial right was concerned, trial should have begun within 60 calendar days of the filing of the information, or by November 12, 2007. (Pen. Code, § 1382, subd.(a)(2).) However, it appears that at the October 3, 2007 hearing, appellant's counsel consented to a trial date beyond the 60 days, thus impliedly waiving appellant's speedy trial rights. (See *People v. Wilson* (1963) 60 Cal.2d 139, 146 [consent will be *presumed* if the defendant fails to take the necessary procedural steps of making timely objection to such delay and thereafter moving for dismissal, which must be commenced before trial].)

pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden* motion) to replace his appointed counsel.

The Attorney General concedes that the trial court erred in refusing to entertain appellant's *Marsden* motion, but asserts that appellant cannot demonstrate that he was prejudiced thereby. Accordingly, we must determine if the refusal by the trial court to hear appellant's *Marsden* motion prejudiced appellant, and if so what remedy is appropriate in this case. For reasons that follow, we conclude that appellant was prejudiced and that the appropriate remedy is to return this case to the trial court to hold a hearing on appellant's *Marsden* motion.

Background

The record shows that defense attorney James Dozier represented appellant at the September 7, 2007, preliminary hearing.

At the November 21, 2007 hearing, as noted, defense counsel declared a doubt as to appellant's competence to stand trial. Thereafter, the following colloquy ensued:

"DEFENDANT MAQUIZ: Am I permitted to say something?

THE COURT: Um, you might want to talk to your lawyer first, but I'll give you a minute to talk to Mr. Dozier and you can decide.

DEFENDANT MAQUIZ: If I'm permitted, first of all, good morning. [¶] I want to file a Marsden hearing in regard to my lawyer and I have three other oral motions if I'm permitted to submit. [¶] I haven't - - I have an extreme conflict of interest with my lawyer as to what he - - he - - he's telling me one time and telling me other times. And would you allow a Marsden hearing?

THE COURT: Well, at this time based on what your lawyer said, I'm not going to entertain a Marsden motion. However, at some point in the future, depending on the results of the information we get from the doctor, I will - - I may allow that to happen. All right? But at this point, what I want you to do is I'm going to get an evaluation from a medical professional about the - -

DEFENDANT MAQUIZ: I'd like to represent myself. Would that - -

THE COURT: Those are all sort of tied together. Until I get the information back from the doctor, we're not going to be able to go any further.

DEFENDANT MAQUIZ: That's not going to be in plenty of time for trial.

THE COURT: There is no trial on Monday. I need to get you evaluated by a doctor so I can find out what's going on. Then once we get that, we can take up your issue about trying to represent yourself.

DEFENDANT MAQUIZ: Your Honor, my exposure is six years. He's trying to offer me four. The reason why he's saying that is because I told him I want to exercise my right for a trial. He's saying that's not right, that's stupid. I told him why is it stupid to exercise my right when my exposure will only be two more years than what they're offering me? I have a solid defense. Not solid, but I have a defense that I'm willing and I want to take to the jury.

THE COURT: Okay. Well, that's your right. You were scheduled for trial, and but for the fact that there's an issue that's arisen and there's sufficient evidence for me to believe that we need to have a doctor's report, you will be - -

DEFENDANT MAQUIZ: Because I want to go to trial?

THE COURT: - - hang on - -you would have been having a trial. All I'm telling you is is that I need this doctor's report and then we'll see about getting you to trial and see about whether you can represent yourself. None of that's going to happen until after I got the doctor's report.

DEFENDANT MAQUIZ: He's saying this because I don't want to take the deal. Is that what constitutes a need for a doctor because somebody don't want to take the deal? So be it.

THE COURT: That's not what he's saying. So what we're going to do is I'll get the doctor's report back. You can talk all of this over with him and we'll see.

DEFENDANT MAQUIZ: The reason for he wants to take a deal he has nothing ready to trial. . . .

MR. DOZIER: Judge, I'd ask the Court not to - - I mean he's going to start compromising his defense.

THE COURT: I don't want you to say anything about the facts of the case. When we do go to trial, everybody in here will remember what it was and the D. A. can use it against you. I don't want you to say anything that might hurt you later. [¶] We'll see about getting you out to trial, but the first thing we have to do is have a doctor talk to you. After I get the report back, we'll see about if you can represent yourself and setting of the trial date.

DEFENDANT MAQUIZ: You're saying right now I'm not entitled to represent myself?

THE COURT: Correct. Thank you."

At a hearing held on January 9, 2008, appellant appeared and was still represented by Mr. Dozier. The court did not have the competency report from the doctor and so issued another order appointing Dr. Fithian. The court continued the matter to February 27, 2008, for receipt of Dr. Fithian's report.

On February 27, 2008, the trial court summarized Dr. Fithian's report, which had concluded that appellant was competent to stand trial. Mr. Dozier reminded the court that appellant had brought a *Faretta* motion (*Faretta v. California* (1975) 422 U.S. 806), and urged the court to deal with that motion before deciding on the issue of appellant's competency. Mr. Dozier said that he was not sure what appellant wanted to do, but it was his "intention, regardless of the Faretta motion outcome, to file a conflict in this matter. One way or the other, [he would not] be the attorney involved."

Thereafter, the trial court relieved Mr. Dozier as defense counsel and asked appellant if he wanted to represent himself. Appellant indicated that he wished to represent himself and asked the court if he could make two motions. The prosecutor

prompted the court to inquire if appellant wished to have a different appointed attorney. The court told appellant that he was entitled to another attorney because Mr. Dozier had declared a conflict and asked appellant if he wanted "to communicate with them first before" deciding to represent himself. Appellant asked the court, "If you appoint another attorney, can I still make the two motions?" The court replied, "Well, since I don't know what they are, I sort of have to guess and say that, yes, you and your attorney can bring motions." The court asked appellant to tell the court what the motions were. Appellant outlined the motions he wanted to bring. Then, the court stated that it would not hear the two motions but wanted to settle whether appellant desired new appointed counsel.

Appellant stated that he did not want to waive time and wanted to proceed to trial as quickly as possible. The court explained that criminal proceedings were suspended when appellant was "sent out for a review to determine whether [he was] competent." Appellant said that he had some "case law" on that, but the court refused to "get into a legal discussion" with appellant because the court believed that it had "followed proper procedure in suspending your criminal proceedings."

Subsequently, the following exchange took place between appellant and the court:

"THE COURT: . . . [¶] If you wish to talk to a lawyer, the first thing that we need to decide is whether or not we're going to determine if you are, in fact, competent. And once that happens, then criminal proceedings are reinstated and your time clock starts running. [¶] So, yes, you're right, once the clock starts running, you'll have to be tried within a certain period of time. [¶] So I need you to tell me, you want a lawyer to help you or you want to represent yourself, and then we need to decide when we're going to address the issue of whether you are competent or not to see whether the clock is going to start ticking or not.

MR. MAQUIZ: He said the results were in about that competency.

THE COURT: Right. But because you wanted a new - -

MR. MAQUIZ: He said it was okay.

THE COURT: That's what the reports say, and the D.A.'s prepared to submit on those reports. But you and your lawyer have the ability to bring up issues about that. You can either submit on those reports or not, but you need to decide how you want to proceed. [¶] Do you want a lawyer to help you decide that or do you want to represent yourself?

MR. MAQUIZ: Can I represent myself with the lawyer?

THE COURT: Well, certainly when you have a lawyer, the two of you work together but it's not technically representing yourself. You'd be represented by an attorney. But if you decide you don't want him and you want to represent yourself, you can always ask the Court to do that later.

MR. MAQUIZ: I'll get another lawyer. It does not preclude my 60-day trial?

THE COURT: Well, your 60 days won't start running until we determine whether you're competent or not and reinstate criminal proceedings.

MR. MAQUIZ: How can I get one without - -

THE COURT: Let me ask you a question. [¶] Do you want to represent yourself and address that issue, or do you want me to appoint a lawyer and we'll have you come back in two weeks and address it in two weeks?

MR. MAQUIZ: So it depends on this?

THE COURT: Right.

MR. MAQUIZ: I'll represent myself."

After that, appellant completed a form formally seeking self-representation and the trial court admonished appellant before taking his waiver of the right to have counsel appointed. From that point on, appellant represented himself. The court continued the hearing for two weeks so that appellant could review Dr. Fithian's report.

On April 4, 2008, appellant was found competent to stand trial. Appellant represented himself at the competency hearing. During the hearing, appellant requested that the court appoint co-counsel, but the court refused. After being found competent,

appellant requested that the court appoint standby counsel. The court told appellant that he would have to file a motion to make such a request.

As trial was about to start, appellant told the court, "I'd like to just reiterate and mention that, even though if I have an option between counsel or no counsel, I'll represent myself, but co-counsel or assistance was nevertheless desired. But I'm okay if that was denied, if it continues to be denied." The court replied that the denial of this request "continues to be the Court's ruling."

Appellant represented himself at trial and was found guilty by a jury on June 5, 2008. After he was convicted, it appears that appellant obtained counsel for the purpose of bringing a new trial motion, which the court denied. On June 17, 2009, the court sentenced appellant to the upper term of four years doubled by the strike prior for a total sentence of eight years in state prison.

Discussion

"*Marsden* and its progeny require that when a defendant complains about the adequacy of appointed counsel, the trial court permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. [Citations.] If the defendant states facts sufficient to raise a question about counsel's effectiveness, the court must question counsel as necessary to ascertain their veracity. [Citations.]" (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695 (*Eastman*).)

"[T]he trial court must permit the defendant to explain the basis of his [or her] contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations]." (*People v. Crandell* (1988) 46 Cal.3d 833, 854 [abrogated on other grounds, *People v. Crayton* (2002) 28 Cal.4th 346, 364-365].)

Although appellant unequivocally requested a *Marsden* hearing after his counsel declared a doubt as to his competency, the trial court declined to act, believing that appellant's mental competence had to be determined first. This was error by the trial court. "While it is true that section 1368 mandates the suspension of 'all proceedings in the criminal prosecution' once the court has ordered a hearing into the mental competence of the defendant [citations], it is equally true that the Sixth Amendment right to effective representation virtually compels a hearing and an order granting a motion for substitution of counsel when 'there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if [the defendant's] request was denied.' [Citations.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 87-88.) Here, appellant claimed that counsel was confusing him and would not listen to him when he said that he did not want to take a plea deal, but wanted to go to trial. The court should have conducted a *Marsden* hearing, notwithstanding the pending issue regarding defendant's competency. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069-1070 (*Solorzano*); accord, *People v. Taylor* (2010) 48 Cal.4th 574, 600-601 [agreeing with the defendant that the trial court erred when it brushed aside his initial requests for substitution of counsel in the belief that the question of the defendant's competence to stand trial had to be resolved first].)

In *Solorzano*, while criminal proceedings were suspended, the defendant requested a *Marsden* hearing. The court believed that a hearing was not required at that time due to counsel's declaration of a doubt as to the defendant's competency. The defendant, who reproached his attorney for not securing medical and school records which might have demonstrated his incompetence to proceed, was found competent against his wishes. The court then denied his motion to relieve counsel. The appellate court reversed, finding that it could not " 'conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to [the finding he was competent to stand trial]. [Citation.]' " (*Solorzano, supra*, 126 Cal.App.4th at p. 1071.)

As noted, the Attorney General concedes that the trial court erred in refusing to hear the *Marsden* motion that appellant made moments after his attorney declared a doubt as to his competency. The Attorney General argues, however, that this case is distinguishable from *Solorzano* because appellant considered himself to be competent. The Attorney General argues, "Appellant was dissatisfied with Dozier [his attorney] because he caused a delay in the start of trial by expressing a doubt as to appellant's competency. There is no suggestion that appellant wanted an attorney other than Dozier to establish appellant's incompetency. The trial court ultimately relieved Dozier, and appellant elected to represent himself at the competency proceeding and at trial. On this record, the trial court's failure to formally pursue appellant's stated reasons for wanting to replace Dozier when Dozier declared a doubt as to his competency caused no prejudice . . . ."

The Attorney General contends that ultimately the trial court gave appellant everything he sought. Thus, the Attorney General argues any error in failing to hold a hearing concerning appellant's complaints against Mr. Dozier was rendered harmless by the subsequent order relieving Mr. Dozier and appellant's election to represent himself at trial.

The Attorney General's argument ignores one important thing: appellant wanted an attorney who would take his case to trial in an expeditious manner and not force him into taking a plea bargain.[2]

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[2] In *Faretta v. California* (1975) 422 U.S. 806, 819-820, the United States Supreme Court, in discussing the nature of the rights guaranteed by the Sixth Amendment of the federal Constitution, explained: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. [¶] The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language

Here, appellant stated that he wanted to represent himself as a direct result of the court refusing to hear his *Marsden* motion. In denying appellant's request for a *Marsden* hearing, the court suggested that appellant might never actually be able to obtain such a hearing, stating, "at some point in the future, *depending on the results of the information we get from the doctor, I will-I may allow that to happen*." (Italics added.) These remarks suggested that appellant might never get his *Marsden* hearing if he was found to be incompetent. Thus, appellant was left with the impression that to get the case to trial he had to represent himself, establish his competency, and continue to represent himself so that appointed counsel would not again raise a doubt as to his competence to stand trial. To put it simply, the only conclusion that appellant could draw from the court's response was that if an appointed attorney chose to betray him for the sake of the attorney's convenience by declaring doubt as to appellant's competence to stand trial, coming at the last possible moment before the trial was to begin, the court would simply allow the betrayal to occur.[3] Later, when appellant was asked if he wanted an appointed lawyer, predictably, his response was that he did not want one because he had "had very bad experiences."

If the court had held the *Marsden* hearing when appellant first requested it, the record strongly suggests that there was in fact a complete breakdown of the attorney/client relationship. After all, at the time set for the competency hearing, Mr. Dozier stated that he was declaring a conflict and would no longer represent appellant.[4]

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and the spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."

[3] It is quite apparent from the record that appellant was still under the impression that he had not waived his speedy trial rights and was expecting a trial to commence within a few days.

[4] Furthermore, as noted, appellant was still under the impression that he had not waived his speedy trial rights and was expecting a trial to commence within a few days.

However, we can only guess as to how proceedings would have been different had a new attorney been appointed. It is possible that if the court had held a hearing, counsel would have been removed, new counsel would have been appointed and appellant would not have been placed in the position of having to represent himself at trial due to the fact that his confidence in the appointed counsel system had been soundly undermined. Here the court failed to hold a *Marsden* hearing and effectively forced appellant into representing himself to appellant's detriment. Certainly, a competent attorney would have represented appellant far better than appellant was able to represent himself.[5] Accordingly, we cannot conclude beyond a reasonable doubt that the error here was harmless.

Although this case must be returned to the trial court, we address appellant's remaining issue in the event that the trial court denies the *Marsden* motion.

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[5] In reviewing the record it appears that appellant managed to perform as well as anyone could hope to perform while remaining in custody and attempting to serve as his own attorney. However, the record demonstrates that appellant was denied access to legal research during substantial portions of the trial. In discussing jury instructions on the third day of trial, appellant noted that since he had made the request that he be allowed to go to the law library and the court had ordered that he be permitted to use the law library "3 times per week for 4 hours" when available, no access had been provided. Ultimately, he had to request to borrow a copy of the book containing the California Judicial Council Criminal Jury instructions.

Furthermore, during voir dire while the court was questioning the prospective jurors on their impartiality, one prospective juror stated in front of the rest of the jury pool that he knew why appellant had been convicted and was in prison because he had seen the television show "Prison Break." The prospective juror went so far as to claim that he recognized appellant's face from seeing him depicted on the television program. Although ultimately, the juror was excused for cause, appellant made no attempt to ask for a mistrial or to discharge the venire after these remarks were made. The implication that these remarks could have conveyed to the rest of the jury pool was that appellant had been involved in an attempt to escape from prison. In a case where appellant was charged with possessing a weapon, that implication was extraneous evidence that what Officer Rasley claimed he found on appellant was a weapon that was used in the escape attempt. Had appellant been represented by competent counsel, we have no doubt that the matter would have been handled differently.

Appellant contends that the court erred in denying his request to modify California Judicial Council Criminal Jury instruction No. 2745 (hereafter CALCRIM).

As noted, appellant was charged with possession of a weapon, specifically a sharp instrument by a prison inmate in violation of Penal Code section 4502, subdivision (a). This statute provides in pertinent part, "Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control . . . . any dirk or dagger or sharp instrument . . . is guilty of a felony and shall be punished by imprisonment in the state prison for two, three, or four years, to be served consecutively." The standard jury instruction given for this crime is CALCRIM No. 2745.

In this case, appellant requested three modifications to CALCRIM No. 2745. One of the requested modifications was to add language informing the jury that it could consider whether the object could be used in a harmless way in deciding if the object is a sharp instrument. The court denied the request to add this language to the instruction. Accordingly, the court instructed the jury with CALCRIM No. 2745 that "The defendant is charged in Count 1 [with] possessing a weapon, specifically a sharp instrument while in a penal institution. To prove that the defendant is guilty of this crime, the People must prove the following. [¶] One, the defendant was present at or confined in a penal institution; [¶] Two, the defendant possessed or carried on his person a sharp instrument; [¶] Three the defendant knew that he possessed or carried on his person a sharp instrument; [¶] And four, the defendant knew that the object was a sharp instrument. [¶] A penal institution is a state prison."

Appellant argues that the instructional modification he requested was both legally correct and spoke directly to a basic factual dispute in the case. Relying on *People v. Custodio* (1999) 73 Cal.App.4th 807 (*Custodio*), appellant asserts that the "requested instructional language was appropriate because it was necessary to save Penal Code

section 4502, which prohibits prison inmates from possessing 'any dirk or dagger or sharp instrument' from unconstitutional vagueness as applied to the facts of this case." Thus, in essence, appellant is mounting an unconstitutionally vague as applied challenge to CALCRIM No. 2745.

In *Custodio, supra,* 73 Cal.App.4th 807, which was a challenge to the constitutionality of Penal Code section 4502, the Third District Court of Appeal rejected the defendant's argument that "sharp instrument" in Penal Code section 4502 was unconstitutionally vague on its face and as applied to the facts of the case. (*Id.* at p. 811.) In *Custodio,* correctional officers found in the defendant's cell "a plastic barrel of a ballpoint pen with a piece of metal like a sewing machine needle sticking out of it. An expert opined that the object was 'very capable of being used as a weapon' because the metal was extremely stiff, had been affixed by melting the plastic of the pen barrel, and the entire object had a tapered shape so that 'once it starts, there is nothing going to stop it from going as hard as one . . . push[es] it.' " (*Id.* at p. 810.) The defendant said the item was a "cup pick" used for artistic talents to engrave his cup and sunglasses. (*Ibid.*)

Amongst other things, on appeal from his conviction, the *Custodio* defendant argued Penal Code section 4502 was unconstitutionally vague as applied to him because "a 'cup pick' is a device made by an inmate for the ordinary purpose of using it to engrave designs on plastic items, such as cups . . . ." (*Custodio, supra,* 73 Cal.App.4th at p. 812.) The defendant suggested that "the 'cup pick' found in his possession 'was no more dangerous than is a pen or pencil,' " (*ibid*) and argued "(1) he was required to speculate whether it was prohibited by section 4502, subdivision (a), and (2) he was prosecuted 'purely on the whim of a prison guard who chose to deal with this situation as a felony criminal offense rather than simply as an administrative matter, as apparently are the other "cup pick" cases.' " (*Ibid.*)

In disagreeing with the *Custodio* defendant's argument that the statute was unconstitutionally vague as applied to him, the Appellate Court noted, "Evidence

established that the sharp instrument seized from defendant's cell was capable of being used to inflict injury as a stabbing device, and that the instrument was not necessary for defendant to have in his possession. This is not a situation where a device used for artistic purposes was possessed in a prison craft room. In fact, defendant concedes that all 'cup picks' found in prison cells are confiscated by the authorities. [¶] Therefore, defendant reasonably should have known he could not lawfully possess the sharp instrument in his cell. There is no evidence to support his suggestion that the possession of a 'cup pick' by an inmate does not ordinarily lead to prosecution pursuant to section 4502, subdivision (a). [¶] *Considering the nature of the item* found in defendant's cell (including its tapered shape and the length and firmness of its sharp metal point) and the fact it is not a necessary possession for an inmate, a person of ordinary intelligence would know it is a sharp instrument which falls within the prohibition of section 4502, subdivision (a)." (73 Cal.App.4th at pp. 812-813, italics added.)

Here, appellant argues that the "version of CALCRIM No. 2745 given to the jury in this case . . . did not suggest that the jury should consider 'the nature of the item' in deciding whether it constitutes a 'sharp instrument.' Thus, the jury was not asked to apply the very criteria that ostensibly save section 4502 from unconstitutional vagueness." He asserts that the "relevant principle of *Custodio* for this case is not, as the trial court put it, that 'everybody knows what a sharp instrument is,' but rather [that] the jury, in determining whether an object violates section 4502, must consider 'the nature of the object' - an analysis that should take into account the object's potential for innocent use."

Respectfully, we disagree. First, the language of a statute defining a crime is generally an appropriate and desirable basis for an instruction. (Cf. *People v. Cantrell* (1992) 7 Cal.App.4th 523, 543.) A comparison of the pertinent language of Penal Code section 4502, subdivision (a) (see *ante*), with the pertinent language of CALCRIM No. 2745 (see *ante*), reveals that the latter language essentially tracks the statutory language. Second, the issue in *Custodio* was whether or not a defendant would *know* that the sharp

instrument he or she possessed fell within the provisions of Penal Code section 4502, not whether the jury needed to consider the nature of the object in determining whether it was a sharp instrument and that analysis should take into account the object's potential for innocent use. "Cases are not authority for propositions they do not consider." (*People v. Martinez* (2000) 22 Cal.4th 106, 118.)

Finally, "[a] party is not entitled to an instruction on a theory for which there is no supporting evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 868.)[6]

The problem with appellant's argument is that there was not sufficient evidence that the sharpened steel shank secreted in the core of a pencil was possessed for a legitimate or innocent purpose. Although Officer Rasley testified that the tip of the object was wide and flat and appellant told him that the object was a screwdriver after the officer removed the paper from the shaft of the pencil, the instrument was completely concealed within the shaft of the pencil. This undermines appellant's statement that it was a screwdriver and his position that it was possessed for a harmless or innocent purpose. Moreover, appellant's defense, presented through the testimony of fellow inmates, was that he did not possess the pencil with the steel core; that an officer picked up the pencil from the floor, which was covered with trash.[7]

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[6] Based on *People v. Savedra* (1993) 15 Cal.App.4th 738 (*Savedra*), we note that the Bench Notes to CALCRIM No. 2745 advise that if there is *sufficient evidence* of a harmless use for the object possessed the court may add additional language. (Bench Notes to CALCRIM No. 2745 (2010) p. 671.) So the instruction states "You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <*insert type of weapon from Pen. Code, § 4502*>, as defined here." We note, however, that *Savedra* did not address the constitutionality of CALCRIM No. 2745.

[7] Ignacio Silva testified that although his view of the search was obstructed he could see clothes being thrown on the ground out of the shower area and clothes being kicked around. At some point, an officer picked up an item that was on the floor along with a lot of trash. Aaron Ramirez testified that there was a lot of trash around at the time of the search and that the appellant's clothes were thrown out into the same area where the trash was located. Similarly, appellant's cellmate testified that the area around the search was cluttered with miscellaneous objects; that after appellant handed over his clothes, a

Accordingly, since there was no substantial evidence to support the modification that appellant requested, the trial court did not err by refusing to give that modification. (Cf. *People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

Disposition

We reverse the judgment and remand the matter to the trial court for a hearing on appellant's *Marsden* motion. If the court finds that appellant makes a prima facie showing of ineffective assistance of counsel or that appellant and Mr. Dozier were embroiled in such an irreconcilable conflict that ineffective assistance of counsel was likely to result, the trial court should appoint new counsel to assist appellant in filing a motion for new trial or any other motion that newly appointed counsel may deem appropriate. (See *Eastman*, *supra*, 146 Cal.App.4th at p. 699; see also *People v. Reed* (2010) 183 Cal.App.4th 1137, 1149.) However, the trial court shall reinstate the judgment if (a) the *Marsden* motion is denied, (b) the *Marsden* motion is granted but substitute counsel declines to file a new trial motion or other appropriate motion, or (c) the *Marsden* motion is granted but the trial court denies a new trial motion or other appropriate motion filed by substitute counsel.[8]

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correctional officer searched the clothing and put it aside; that nothing was taken from appellant's clothing; that it was about two hours after the clothing was thrown out of the shower area that the officer picked up the pencil from the ground.

[8] We do not intend to suggest that appellant's *Marsden* motion should be granted or that appellant has made, or will make, a colorable claim justifying appointment of substitute counsel for purposes of filing a new trial motion or any other motion, even though the record strongly suggests that there was a breakdown in the attorney/client relationship. We recognize that such decisions rest in the sound discretion of the trial court and we may not be in receipt of all the facts.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.